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In the Supreme Court of the United States

OCTOBER TERM, 1966

Nos. 462 & 463

WASHINGTON PUBLIC POWER SUPPLY SYSTEM, STEWART L. UDALL, SECRETARY OF THE INTERIOR,
Petitioners,

v.

FEDERAL POWER COMMISSION,
Respondent.

WASHINGTON STATE SPORTSMEN'S COUNCIL, INC.
OREGON WILDLIFE FEDERATION
FISHERMEN'S COOPERATIVE ASSOCIATION, INC.
NORTHWEST FISHERIES ASSOCIATION
ALASKA FISHERMEN'S UNION
PACIFIC FISH CONSERVATION LEAGUE
MAKAH INDIAN TRIBE
Intervenors (on this brief)

BRIEF OF RESPONDENT INTERVENORS

Respondent Intervenors pray that the decision of the lower Court affirming the decision of the Federal Power Commission be affirmed for the reason that the decision of the lower Court with respect to both petitioners was based on well settled principles of administrative law concerning the scope of review of administrative determinations.

STATEMENT

The fact that Washington Public Power Supply System ("Washington Supply System") so strenuously opposed the participation before this Court of the Intervenors on this Brief compels us to present a statement of our position in this proceeding. We have had a long history of opposing any party proposing to build a hydroelectric project which would seriously threaten the fishery resources of a river system. Because of our vigilance we have come to know the companies and agencies which are in the power business. We have also come to know the hydroelectric projects which would seriously threaten the already depleted fishery resources of the Pacific Northwest, such as Nez Perce and Lower Canyon.

Nez Perce, of course, has been a threat for many more years than Lower Canyon. Because of the importance of the anadromous fish runs utilizing the Salmon River, every State or Federal agency that has examined the matter has found that if these fish are to be preserved, any high dam on the Middle Snake should be built upstream from the Salmon River. In 1949 the Corps of Engineers recommended that if fish passage had not been solved by the time of construction, power development should be at the Mountain Sheep site just up stream from the mouth of the Salmon River in lieu of the Nez Perce site. While the Corps of Engineers was conducting further studies in this area in 1951, we joined other conservation groups in the Pacific Northwest in recommending moving the project above the

Imnaha River in order to also preserve that fishery. In October 1954, the Corps and the Bureau of Reclamation agreed with our recommendation and recommended construction of Mountain Sheep-Pleasant Valley. This project would have developed the Snake between the Imnaha and Hells Canyon and would have effectively prevented the construction of Nez Perce.

Up to this time the member companies of Pacific Northwest Power Company ("Pacific Northwest") had consistently displayed a sincere and aggressive desire to preserve the fishery and game resources affected by all hydroelectric projects which they operated. They had willingly and without any prodding expended considerable funds for research and facilities directed toward fish and game conservation, which far exceeded the minimum requirements under their respective licenses. Therefore, when Pacific Northwest applied for a preliminary permit in November 1954 to undertake an investigation of the Middle Snake, we, along with other conservation groups, felt confident that Pacific Northwest would do everything in its power to protect the fishery resources. We were quite relieved when the Northwest Public Power Association, a predecessor in interest of Washington Supply System, an unyielding advocate of Nez Perce, failed in its protest of the application. We felt that whatever project was ultimately found to meet the "best adapted" requirements of Section 10 (a) of the Federal Power Act, Pacific Northwest would emphasize the need to include fish conservation as an integral part of the comprehensive plan best adapted to develop that reach of the river.

Needless to say, we were disappointed when the Commission denied Pacific Northwest's license application for Mountain Sheep-Pleasant Valley.[1] Our confidence, however, in Pacific Northwest was proven justified when it refused to file a license application for Nez Perce in spite of the fact that the Commission virtually invited it to file for that project.[2]

In March 1958, Pacific Northwest applied for a license to construct a dam at High Mountain Sheep. Although it had previously investigated this site while its Mountain Sheep-Pleasant Valley application was pending and found it to have excellent potential flood control and power benefits, it was reluctant at that time to present these findings to the Commission because it felt it would interfere with fish migrating to and from the Imnaha. However, in view of the Commission's opinion that Nez Perce was the best project, it felt justified to make a case for High Mountain Sheep since any fish loss in the Imnaha would be virtually nonexistent in comparison to the enormous loss of the fishery resources of the Salmon River if Nez Perce were built. We and other conservation groups recognized that Pacific Northwest had done everything in its power to hold the line to keep it from creeping downstream to the Nez Perce site. We, therefore, chose not to oppose its High Mountain Sheep application because we felt confident, in view of its previous conduct, that Pacific Northwest would exert more effort and expend more funds than its license might otherwise require in order

[1]Pacific Northwest Power Co., 19, F.P.C. 127 (1958)
[2]II R. 653

to reduce the fish losses. The National Hells Canyon Association and the Northwest Public Power Association, Washington Supply System's predecessors in interest, again intervened and protested this license application by urging Federal construction of Nez Perce. We did not feel it was necessary for us to intervene since no one was actually applying for a license to build Nez Perce. We felt the interests of all conservation groups would be well protected and zealously advocated by Pacific Northwest. When, however, two years later Washington Supply System applied for a license to build Nez Perce, we realized that we could no longer take a back seat to these proceedings. Washington Supply System had consistently displayed an utter disregard for the fishery resources of the Middle Snake River and considered them expendable when compared with power benefits. Our past experience with some of its members[3] had been quite dismal. We recalled how grudgingly they provided fish passage facilities to meet their minimum license requirements. We also recalled an emergency hearing before the Commission to prevent one of these members from pouring concrete in an area designated as a fish passage facility in order to narrow its size and thereby reduce its cost. This license application by Washington Supply System appeared to us to be the greatest threat to conservation that we had ever been faced with. We petitioned to intervene in the proceeding and adopted an unprecedented position, for us, by affirmatively supporting Pacific Northwest's application to build High Mountain Sheep. It became quite

[3] I.R. 251.

apparent that our fears were well founded when on the opening day of the hearing on November 4, 1960, the attorney for Washington Supply System in her opening statement displayed the unyielding determination of this agency to build Nez Perce at any cost:

> "We are in here to see to it that the Nez Perce project is licensed, and we intend to take every step that is necessary to that end, including whatever procedural steps we feel in all good faith and honesty are necessary to protect our position. That is our one and only motivation and objective."[4]

Although the Lower Canyon project on the Salmon River was included as a part of Pacific Northwest's proposed plan of development, we were quite certain that this company would never build it until the fish passage problems at high dams were proven solved. In contrast with the attitude of Washington Supply System, the testimony of the Chairman of the Board of Pacific Northwest reassured us of the continued good faith desire of his company to conserve the fishery resources of the Salmon River:

> "* * * We consider that the Salmon River must be recognized as placed in a unique status in the Pacific Northwest. We think it is proper under the Federal Power Act that that status be recognized and that the Commission should regard the Salmon River as a fish sanctuary until there have been tested and proven on other streams methods which will safely pass migrating salmon."[5]

We cannot help but feel that if Washington Supply System were the licensee to build High Mountain Sheep,

[4] IV R. 5
[5] IV R. 25

it would stop at nothing to build Lower Canyon as soon as its power needs required it regardless of whether or not the fish passage problems were proven solved at that time.

As further evidence of its desire to exceed the normal requirements for fish passage facilities at High Mountain Sheep, Pacific Northwest proposed such elaborate and costly facilities, just to attempt to pass the relatively small number of fish at the Imnaha River, that the cost estimates for these facilities far exceeded any cost estimates indicated by Government agencies.[8] They were more elaborate and costly, with a far greater probability of success, than the facilities proposed for the same project by Washington Supply System. As the hearing progressed there was absolutely no question in our minds and, we dare say in anyone's mind, as to which applicant was more interested in conservation.

In April 1961, with astonishing effrontery, Washington Supply System sought to expropriate Pacific Northwest's High Mountain Sheep project by demanding a license on that project if Nez Perce were rejected. If both applicants had shown equal regard for conservation, fair play alone would have dictated that Pacific Northwest be granted the license. But more than fair play was at issue. If Washington Supply System were granted the license for High Mountain Sheep, we could anticipate the furnishing of the scantiest of fish facilities in order to meet the minimum requirements of the license. But even more serious, we could anticipate a

[8] IV R. 26

determined attempt by Washington Supply System to construct Lower Canyon, without regard to whether or not fish passage problems at high dams were proven solved. It is for these reasons that we are so intensely opposed to the granting of the license to Washington Supply System.

On June 28, 1962, nine and one-half months after the hearing had been concluded, the Secretary of the Interior notified the Commission that he believed the Commission should recommend to the Congress that the High Mountain Sheep project be built by the United States. Without ever presenting any testimony, although he had ample opportunity and his views were solicited from time to time by the Commission, he had previously taken several different positions with respect to the High Mountain Sheep and Nez Perce applications. He first suggested that any project in the Middle Snake River area be deferred pending further research into methods of handling anadromous fish. He next requested that the Commission recess the hearings for approximately three years until the Department of Interior completed a "crash program" to study fish passage facilities. With his proposal that the Commission recommend Federal development, he offered no evidence that Congress would even entertain such a recommendation. It appeared that the Secretary desired to delay construction of High Mountain Sheep for any reason. We have consistently opposed the Secretary's recommendation. If the Commission recommended Federal development and Congress did not agree, we are inclined to believe that Washington Supply System

would be back seeking a license to build Nez Perce, claiming that now the fish problems have been solved, which they have not. We do not relish another battle on that issue. If, on the other hand, Congress did authorize the Federal development of High Mountain Sheep, we have no reason to believe that the Federal licensee would be equally as aggressive in conserving the fishery resources as Pacific Northwest. We have, at least, ample evidence of Pacific Northwest's conservation minded attitude. On the other hand, the Secretary of the Interior appeared to display a disregard for our position during the thick of the Nez Perce battle when he abandoned the battle on March 25, 1961, by revoking permission previously granted to Department of Interior biologists to appear as witnesses in the proceedings.[7]

Eventually the Commission acknowledged that its earlier opinion about successful fish passage at Nez Perce was unjustified and commended Pacific Northwest for "sticking with its concept regarding the proper development of the Snake."[8] It found that High Mountain Sheep represented the best development of this reach of the Snake River and granted the license to Pacific Northwest. It further found that a recommendation to Congress of Federal development was not warranted. We agree.

The Court of Appeals for the District of Columbia Circuit ultimately affirmed the Commission in all respects.

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[7]J.A. 138-140

[8]II R. 653

ARGUMENT

In our Brief in opposition to the respective petitions for Writs of Certiorari, we urged that the decision of the Court of Appeals with respect to both Petitioners was correct since it was based on well settled principles of administrative law concerning the scope of review of administrative determinations. The test applicable to the issues raised by Washington Supply System is not whether the determination made by the Commission on the scope of the preliminary permit is the only reasonable one, or even that it is the result the Court would have reached, but whether the administrative determination had "warrant in the record and a reasonable basis in law." The test applicable to the issues raised by the Secretary of the Interior is whether the Commission finding against Federal development had some basis in evidence so as not to be devoid of reason. We respectfully submit that there is sufficient evidence in the record to meet these respective tests. We hereby adopt and incorporate by reference our prior Brief in this Court.

Respectfully submitted,

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